No. 85732-6

SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 63572-7-I
COURT OF APPEALS, DIVISION I, STATE OF WASHINGTON

ROGELIO H.A. RUVALCABA and ELAINE H. RUVALCABA, husband and wife,

Respondents,

v.

KWANG HO BAEK and LYUNG SOOK BAEK, husband and wife, and ARNE S. IJPMA and SIEW LOON, husband and wife, and JOHN A. DYER and PAULINE T. DYER, husband and wife; and STEPHEN KLEPPER and KAREN KLEPPER, husband and wife, and STEVEN J. DAY and CATHERINE L. DAY, husband and wife, and LIVINGSTON ENTERPRISES, LLC, an Alabama limited liability company, KAREN M. OMODT, a single woman, MATTHEW GOLDEN and JANE BORKOWSKI, husband and wife, and CARL E. JOHNSON and PHYLLIS JOHNSON, husband and wife,

Petitioners,

WILLIAM V. KITCHIN and CHERYL L. KITCHIN, husband and wife,
Respondents.

"DAY GROUP" PETITIONERS' RAP 13.7 (e) BRIEF

SMITH GOODFRIEND, P.S.
By Howard M. Goodfriend
WSBA No. 14355
1109 First Avenue, Suite 500
Seattle, WA 98101
206.624.0974

PEPPLE JOHNSON CANTU & SCHMIDT PLLC
By Jackson Schmidt
WSBA No. 16848
1501 Western Ave., Suite 600
Seattle, WA 98101
206.625.1711

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

"DAY GROUP" PETITIONERS' RAP 13.7 (e) BRIEF

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This is the Petitioners' KWANG HO BAEK and LYUNG SOOK BAEK, husband and wife; ARNE S. IJPMA and SIEW LOON, husband and wife; JOHN A. DYER and PAULINE T. DYER, husband and wife; STEVEN J. DAY and CATHERINE L. DAY, husband and wife; LIVINGSTON ENTERPRISES, LLC, an Alabama limited liability company; KAREN M. OMODT, a single woman; MATTHEW GOLDEN and JANE BORKOWSKI, husband and wife; and CARL E. JOHNSON and PHYLLIS JOHNSON, husband and wife ("Day Group Petitioners") Supplemental Brief to the Supreme Court, as authorized by RAP 13.7(e). The decision by the Court of Appeals in this matter dated January 21, 2011 should be reversed because it remands the action to the trial court for a factual finding whether voluntarily landlocking one's property constitutes reasonable necessity that will justify condemning another's real property when that inquiry is purely a question of law that should be answered by this court. Moreover, the Court of Appeals inexplicably ignored and failed to address a number of significant and dispositive other issues fully briefed by the parties.

The Day Group Petitioners ask that this court affirm the judgment of the trial court dismissing the Ruvalcaba's action and awarding these Petitioners their attorneys' fees and costs.

II. LEGAL DISCUSSION AND ANALYSIS

A. There is No Reason to Remand on the Issue of Reasonable Necessity.

The trial court dismissed the Ruvalcaba's claim for condemnation because "one cannot create, by one's own action of landlocking one's property, the 'reasonable necessity' that is an element of the plaintiffs' case in a private condemnation way of necessity." (CP 473). The Court of Appeals, in reversing the trial court, held that there is nothing in the condemnation statute expressly prohibiting parties who have voluntarily landlocked their property from exercising the power of private condemnation when there is "reasonable necessity" to do so, and remanded the case back to the trial court for a determination of whether the Ruvalcabas can show "reasonable necessity." The court inexplicably then noted that the landowner's conveyance severing all access is a factor the court can consider in determining whether "reasonable necessity" exists. Op. at 10.

Remand is unnecessary because the trial court considered extensive evidence and arguments regarding whether there was the existence of "reasonable necessity." The record includes Dr. Ruvalcaba's

declaration regarding the whys and wherefores of his decision to landlock his parcel, as well as expert reports and declarations regarding alternative means of access. In short, the Court of Appeals is asking, by way of remand, for the court to do again exactly what it has already done — determine whether reasonable necessity exists, including whether the act of willingly and knowingly landlocking one's parcel can constitute "reasonable necessity."

Moreover, the question of whether severing all access to one's property can constitute reasonable necessity is not a question of fact at all. The application of RCW 8.24.010 is a question of law. See Corp. v. Atlantic Richfield Co., 45 Wn. App. 563, 566, 726 P.2nd 66 (1986)("Whether a statute applies to a factual situation is question of law and fully reviewable on appeal.") In this case, Dr. Ruvalcaba admitted that he voluntarily decided to sever access without reserving an easement. That he did so knowingly and willingly is neither disputed nor controversial. There was nothing precluding him from building an access road through what was going to become the severed parcel when he acquired the property.[1] Moreover, he refused to purchase an adjoining parcel that was available during the pendency of the action below that

---

[1] CP 415-19 (study concludes that access could have been obtained from 42nd)

would have provided an access easement.[2] The only question is the purely legal one — by knowingly and voluntarily subdividing in a way that eliminates access, can one then avail oneself of the power to condemn the lands of others to create a new means of access? That is the issue the Court of Appeals avoided, and it is the central question this Court should address.

The statute must be narrowly construed because the constitutional authority to privately condemn land is framed as an exception to the sanctity of invading another's rights of private property ownership. Carlson v. Kitsap County, 107 Wash. 228, 232, 181 P. 689 (1919)("We are taking the property of one man and giving it to another.") Taking property from one party and giving it to another, as does the private condemnation statute, involves infringing on the constitutional right of property ownership, "which should not be lightly regarded or swept away merely to serve convenience and advantage." Dreger v. Sullivan, 46 Wn.2d 36, 38, 278 P.2d 647 (1955).

In this case the statute cannot be interpreted to shift the cost of subdivision to neighbors, as here. Dr. Ruvalcaba deliberately decided to convey property without reserving access because it was advantageous for him to do so at the time. To now invoke the state power of

---

[2] CP 279-82

condemnation because he regards the cost of acquiring access through the market as more expensive than the cost of condemnation upsets settled expectations and undermines stability of land titles.

And the issue is one that, indeed, involves a great deal of uncertainty to adjoining landowners. This lawsuit has rendered the properties of the Day Group Petitioners unmarketable since it was filed in 2008. To avoid this kind of interference with property rights and to create certainty and stability regarding land titles, the Court should adopt the rule, as did the courts in English Realty Co. v Meyer, 228 La. 423, 432-33, 82 So. 2d 698 (1955); Graff v. Scanlan, 673 A.2d 1028, 1032, 673 A.2d 1028 (Pa. 1996), that one cannot use the private condemnation statute to take the property of others in order to remedy access to a landlocked parcel that was voluntarily, knowingly, and deliberately created by the owner of that parcel.

Pursuant to the foregoing authorities and the arguments advanced herein and in the underlying briefing, this court should find, as a matter of law, that no reasonable necessity exists under the facts of this case.

B. The Court of Appeals Ignored a Number of Dispositive Issues.

The Day Group Petitioners created a record in the trial court showing that 1) at the time he created the severed parcel, there was nothing about the slope of grade of that parcel that precluded its use for

access to the landlocked parcel; 2) the Ruvalcabas had reasonable alternative access through an adjoining parcel that was marketed for sale through the pendency of the lawsuit in the trial court, but they refused to purchase the property, impose an easement, and re-market it; and 3) by waiting 35 years, their claims should be barred by the doctrines of laches and statue of limitations.

These facts give rise to serious issues of law — waiver, abandonment, laches, and the statute of limitations, any one of which could obviate the need for a remand and a trial, yet there is no mention of them in the opinion of the Court of Appeals.

If this Court agrees with the Day Group Petitioners that the case should be dismissed on the issue of voluntary severance of the means of access, there is no need to reach these issues. If this Court so chooses, it could also resolve the case on one of these alternative grounds.

RESPECTFULLY SUBMITTED this 11th day of August, 2011.

PEPPLE JOHNSON CANTU & SCHMIDT, PLLC

By _____
Jackson Schmidt, WSBA No. 16848
Attorneys for Day Group Petitioners

CERTIFICATE OF SERVICE

I, Dawn Anderson, declare that I am employed by the law firm of Pepple Johnson Cantu & Schmidt PLLC, 1501 Western Avenue, Suite 600, Seattle, King County, Washington; that I am over 18 years of age and not a party to this action.

I certify under penalty of perjury under the laws of the State of Washington that on this date I electronically filed the foregoing document with the Supreme Court of the State of Washington by emailing same to Supreme@courts.wa.gov, and I served true and correct copies of the foregoing document on the following attorneys of record in the above-referenced action by the method indicated below:

Pierre E. Acebedo
ACEBEDO & JOHNSON, LLC
1011 East Main, Suite 456
Puyallup, WA 98372
253.445.4936 / 253.445.9529 Fax
pacebedo@acebedojohnson.com
Attorneys for Respondents Ruvalcaba

☐ Messenger
☐ Facsimile
☒ U.S. Mail
☐ Overnight Courier
☒ Email

Timothy J. Graham
HANSON BAKER LUDLOW
DRUMHELLER P.S.
2229 – 112th Avenue NE, Suite 200
Bellevue, WA 98004-2936
425.454.3374 / 425.454.0087 fax
tgraham@hansonbaker.com
Attorneys for Respondents Kitchin

☐ Messenger
☐ Facsimile
☒ U.S. Mail
☐ Overnight Courier
☒ Email

G. Lee Raaen
ATTORNEY AT LAW
PO Box 31698
Seattle, WA 98103-1698
206.682.9580 / 206.632.1193 Fax
lee@lraaen.com
Co-Counsel for Petitioner Omodt

☐ Messenger
☐ Facsimile
☒ U.S. Mail
☐ Overnight Courier
☒ Email

Dated this 11th day of August, 2011.

Dawn Anderson

OFFICE RECEPTIONIST, CLERK

To: Dawn V. Anderson
Cc: 'Jackson Schmidt'
Subject: RE: Ruvalcaba v. Baek (No. 85732-6)

Received 8/11/11

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Dawn V. Anderson [mailto:dawnanderson9@pjcs.com]
Sent: Thursday, August 11, 2011 11:21 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: 'Jackson Schmidt'
Subject: Ruvalcaba v. Baek (No. 85732-6)

Re: Ruvalcaba v. Baek et al.
No. 85732-6

Filed by: Jackson Schmidt, WSBA 16848, Attorneys for Petitioners
PEPPLE JOHNSON CANTU & SCHMIDT PLLC
1501 Western Avenue, Suite 600
Seattle, WA 98101
206.625.1711 / 206.625.1627 Fax
jacksonschmidt@pjcs.com

Attached for filing with the Supreme Court of the State of Washington is the "Day Group" Petitioners' RAP 13.7(e) Brief.

Dawn Anderson
Paralegal to Jackson Schmidt

-=-=-=-=-=-=-

Dawn Anderson
Paralegal
PEPPLE JOHNSON CANTU & SCHMIDT PLLC
1501 Western Avenue, Suite 600
Seattle, WA 98101
206.625.1709 / 206.625.1627 Fax